No. 03-1285

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

In re REGGIE D. HUFF and LISA G. HUFF,

Petitioners.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Ninth Circuit deprive the Petitioners of due process by deciding the case without reading or considering either the Petitioners' briefs or the record of the case, and without oral argument, so that the only remedy available to the Petitioners is for this Court to issue a Writ of Mandamus to the court of appeals disqualifying the former panel and ordering a new panel to read the Petitioners' briefs and hear their oral argument before deciding the case?

RULE 29.6 – CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of the stock of any corporation that is a respondent party in this action.

APPLICABLE RULES OF COURT

FRAP 34. ORAL ARGUMENT

(a) In General.

(1) *Party's Statement.* Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) *Standards.* Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

* * *

(B) the dispositive issue or issues have been authoritatively decided; * * *

STATEMENT OF THE CASE

By notice dated August 5, 2002, the United States Court of Appeals for the Ninth Circuit (hereinafter referred to as "the court of appeals") advised all parties that, pursuant to FRAP 34(a)(2), it was considering submission of the case without oral argument. The court of appeals requested the parties submit FRAP 34(a)(1) statements within 10 days setting forth the reasons why oral argument ought to be heard. [App. 1] No party, including the Petitioners, made an FRAP 34(a)(1) statement.

By notice dated December 5, 2002, the court of appeals advised the parties that although it had previously assigned the case to a panel that decided cases without oral argument, it was reassigning the case to a panel that heard oral argument and that the new panel retained the discretion to order the case submitted on the briefs without oral argument. [PETITIONERS' APPENDIX, *pg.* 42]

By Notice dated July 22, 2003, the case was scheduled for oral argument on September 12, 2003. [PETITIONERS' APPENDIX, *pg.* 44] By Order filed on August 26, 2003, the court of appeals determined pursuant to FRAP 34(a)(2) to submit the case on the briefs without oral argument. [PETITIONERS' APPENDIX, *pg.* 45] On August 27, 2003, the

Petitioners moved the court of appeals reconsider the submission of the case without oral argument. That Motion was denied by Order filed on August 28, 2003. [PETITIONERS' APPENDIX, *pg.* 46] The case was decided on the briefs of the parties, including the Petitioners' opening and reply briefs.

ARGUMENT

1. Did the court of appeals discriminate against the Petitioners because they are *pro se*?

The Petition does not set out any credible evidence in support of the Petitioners' contention that the court of appeals discriminated against them because they appeared *pro se*.

The Petitioners' oft-repeated, unsubstantiated allegation that the court of appeals summarily disregards *pro se* cases as "frivolous and undeserving" [*see*, PETITION, pg. 12-13] is completely unsubstantiated and contemptuous.

2. Did the court of appeals deny the Petitioners due process when it decided the case on the briefs without oral argument?

It may be gleaned from various parts of the Petition that on August 5, 2002, the court of appeals gave notice that it was considering submission of the case without oral argument, that the court allowed 10 days for statements as to why oral argument ought to be heard, and that the Petitioners did not respond to that notice. [*see*, PETITION, pg. 11] The Petitioners misrepresent the court of appeals' December 5, 2002, notice by stating that the court had affirmatively determined to hear oral argument when the notice does nothing more than advise of a panel change, and it expressly reserves to the new panel's discretion whether to hear oral argument. [PETITION, pg. 9]

The Respondents did not ask for oral argument because the legal issues on appeal from the district court to the court of appeals have been authoritatively decided. For reasons known only to the Petitioners, they did not

ask for oral argument when it was a ripe question. Absent any response from the parties, in August, 2002, the court of appeals assigned the case to a panel that did not hear oral argument.

There is nothing in the record that suggests the December, 2002, reassignment of the case by the court of appeals from the original panel to another panel was anything other than an administrative balancing of caseload. There is nothing in the record that suggests the second panel's decision to submit the case on the briefs was motivated by any factor other than a recognition that the legal issues raised had already been authoritatively decided.

FRAP 34 is the law applicable to all appeals. It acknowledges that oral argument is not always necessary for the full and fair administration of justice. The Petitioners had a full and fair opportunity to present their case to the court of appeals, as they did in the district court. The Petition does not establish that the court of appeals abused its discretion to decide the case on the briefs without oral argument.

3. Did the court of appeals deny the Petitioners due process by deciding the case without reading their briefs?

The Petitioners' principal argument to this Court is that the similarities between the holdings of the district court and the court of appeals inescapably leads to the conclusion that the court of appeals chose not to read any of their briefs or the record before the court, electing instead to merely repeat back the appellees' view of the case. This is utter conjecture from the Petitioners. The Petitioners have blinded themselves to the reality that the district court reached the correct disposition of the case, which was correctly affirmed by the court of appeals.

The Petitioners point to two specific instances to support their assertion that the court of appeals has not read the case. First, they argue that the court of appeals

should have noted that the case was reassigned to District Court Judge Ancer Haggerty after District Court Judge Garr King recused himself from the case. Judge King withdrew from the case post-judgment after he was personally threatened by Mr. Huff should he not reverse the judgment of dismissal. The post-judgment reassignment of the case to a new district court judge is immaterial to the questions on appeal and was therefore unnecessary to the decision.

Second, the Petitioners are troubled by the use of the phrase "summary judgment" – a term commonly perceived only in the context of FRCP 56 – in the court of appeals' Amended Memorandum when the district court had dismissed their action on FRCP 12(b)(6) motions. They argue this proves the court of appeals was confused as to the status of the case on appeal. The district court had also denied the Petitioners' motions for reconsideration. In its Amended Memorandum, the court of appeals wrote, "We review for abuse of discretion a district court's denial of a motion to reconsider an order granting summary judgment." [PETITIONERS APPENDIX, pg. 74] The court of appeals was merely setting out the proper standard of review for the denial of a motion for reconsideration of a non-trial disposition, a summary judgment, of the case below. The court of appeals had a clear understanding of the case before it. The court of appeals' original Memorandum opinion affirmed the dismissal of the Petitioners' claims as fatally flawed, its Amended Memorandum expressly affirms the district court's denial of the Petitioners' motion for reconsideration was not an abuse of discretion.

The Petitioners' further attempts to still argue the merits of their case merely obfuscates their failure to plead the enterprise and control elements needed to establish a pattern of racketeering under the applicable statutes. These arguments shed no light on whether the Petitioners were deprived of due process by the court of appeals.

CONCLUSION

A response on the merits of the Petition does not require the Respondents to except to or refute the many instances of unsubstantiated "fact", hyperbole, innuendo, irrelevant, immaterial or scandalous matter in the Petition. The Petitioners' pattern of charging each judge who touches this case to be a co-conspirator of the Respondents, most recently including this court of appeals panel, only protracts the duration and expense of the case to the Respondents. The court of appeals wrote two considered opinions in response to the Petitioners' appeals. The court of appeals gave the Petitioners full and fair opportunity and consideration. The Petition does not compel extraordinary action by this Court. The Petition must be denied.

Respectfully submitted,

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UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street, P. O. Box 193939
San Francisco, CA 94119-3939

August 5, 2002

CA No. 02-35176 Acro-tech Inc. v. The Robert K.

To All Parties:

The United States Court of Appeals for the Ninth Circuit is considering submission of your case without oral argument. You have ten (10) days from the date of this letter to present a statement setting forth the reasons why oral argument should be heard in this case. See FRAP 34(a)(2). Please send an original and three (3) copies of your statement to Clerk's Office in San Francisco, and show proof of service to opposing counsel.

The court welcomes additional citations, without argument, of relevant decisions rendered since filing of a party's last brief. See Fed. R. App. P. 28(j). Send an original and three (3) legible copies to the Clerk's Office, on letter size paper, with proof of service on all parties.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: Tim Hom
Deputy Clerk